Supreme Court, U.S.
FILED
SEP 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-5986

In The
Supreme Court of the United States
October Term, 1989

CLYDE OSBORNE,
Appellant,

v.

STATE OF OHIO,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF OHIO

BRIEF OF AMICUS CURIAE CHILDREN'S LEGAL FOUNDATION

ALAN E. SEARS
DOUGLAS V. DRURY
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

Counsel of Record
Amicus Curiae

BEST AVAILABLE COPY

106 pp

TABLE OF CONTENTS

PAGES

TABLE OF AUTHORITIES.....iv

CONSENT OF THE PARTIES..... 1

INTEREST OF AMICUS CURIAE..... 1

INTRODUCTION..... 4

ARGUMENT.....12

I. THE STATES HAVE A "SURPASSING" INTEREST IN REGULATING CHILD PORNOGRAPHY BECAUSE OF THE GREAT HARM IT INFLICTS UPON OUR CHILDREN....12

A. Child Pornography Is Produced By Sexually Exploiting A Child.....14

B. Child Pornography Creates A Permanent Record Of Abuse Of The Children Involved.....15

C. Child Pornography Itself Is An Instrument Of Abuse.....17

D. Child Pornography Is Used For Illicit Purposes By Possessors.....18

E. Production, Distribution And Possession Of Child Pornography Violates Legitimate Privacy Interests Of The Children Abused.....19

II. A STATE MAY CONSTITUTIONALLY PROHIBIT POSSESSION OF CHILD PORNOGRAPHY.....21

A. The Ferber Rationale That Child Pornography Is Outside The Scope Of The First Amendment Permits States To Prohibit Possession of Child Pornography.....22

B. Criminalizing Possession Of Child Pornography Does Not Violate The Possessor's Right To Privacy.....28

III. THE OHIO CHILD PORNOGRAPHY POSSESSION STATUTE, O.R.C. 2907.323(A)(3) IS CONSTITUTIONAL AND VALIDLY CRIMINALIZES NON-PROTECTED CONDUCT.....37

A. The Ohio Supreme Court Authoritatively Construed Ohio Law In A Constitutional Manner.....37

1. The Ohio Supreme Court Properly Construed The Term "Minor".....39

2. The Ohio Supreme Court Properly Interpreted The Statutes Scienter Requirement.....41

3. The Ohio Supreme Court Properly Construed The Statute To Meet Constitutional Requirements By Applying The Statute Only When The Nudity Constitutes A "Lewd Exhibition" Or Involves A Graphic Focus On The Genitals".....42

B. O.R.C. Section 2907.323(A)(3) Is Not Substantially Overbroad.....45

CONCLUSION.....59

CERTIFICATE OF SERVICE.....60

TABLE OF AUTHORITIES

Cases	Pages
4000 Asher, Inc. v. State, 716 S.W.2d 190 (Ark. 1986)	58
Bowers v. Hardwick, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986)	28
Broadrick v. Oklahoma, 413 U.S. 601 (1973)	45,48
Com. v. Bono, 7 Mass.App. 849, 384 N.E.2d 1260)	58
Com. v. Ferro, 372 Mass. 379, 361 N.E.2d 1234 (1977)	58
Com. v. Stock, 499 A.2d 308 (Pa.Super 1985)	58
Dombrowski v. Pfister, 380 U.S. 479 (1965)	54
Felton v. State, 526 S.2d 638 (Ala. 1988)	22
In Re Kimbler, 100 Cal.App.3rd 453, 161 Cal.Rptr. 53 (1979)	58
Massachusetts v. Oakes, 491 U.S. ___, 105 L. Ed. 2d at 505 (1989)	50
Miller v. California, 413 U.S. 15 (1973)	23,55

N.A.A.C.P. v. Button,
371 U.S. 415 (1963).....38

New York State Club Association v.
New York City,
487 U.S. ___, 101 L. Ed. 2d 1,
108 S. Ct. 2225 (1988).....50

New York v. Ferber,
458 U.S. 747 (1982).....5,14,
25,48,56

Paris Adult Theatre I v. Slaton,
413 U.S. 49 (1973).....32

People v. Geever,
522 N.E.2d 1200 (Ill. 1988).....22,28

People v. Illardo,
48 N.Y.2d 408, 423 N.Y.S.2d
470, 399 N.E.2d 59 (1979).....58

Pope v. Illinois,
481 U.S. 497 (1987).....53

Ripplinger v. Collin,
868 F.2d 1043 (1988).....57

Rose v. Locke,
423 U.S. 48 (1975).....54

Roth v. United States,
354 U.S. 476 (1957).....51,52

Stanley v. Georgia,
394 U.S. 557 (1969).....7,28,
30

State v. Baker,
711 P.2d 759 (Kan.App. 1985).....58

State v. Davis,
768 P.2d 499 (Wash. 1989).....22

State v. J.R. Distributors, Inc.,
82 Wash.2d 584, 512 P.2d (1979)..58

State v. Lesieure,
121 R.I. 859, 404 A.2d
457 (1979).....58

State v. Martin,
719 S.W.2d 522 (Tenn. 1986).....58

State v. Meadows,
28 Ohio State 3rd 43, 503 N.E.2d
697 (1986) cert. denied, 480 U.S.
936 (1987).....22,29,
34

State v. Young,
525 N.E.2d 1363 (1988).....44

United States v. 12-200 Foot Reels,
413 U.S. 123 (1973).....31,55

U.S. v. Wiegand,
812 F.2d 1239 (9th Cir. 1987)....55

Other Authorities

A.L.I. Model Penal Code and
Commentaries, § 251.4(3).....59

Final Report of the Attorney
General's Commission on
Pornography, page 150 (1986).....27

O.R.C. Section 1.42.....39

O.R.C. 2907.04.....40

O.R.C. 2907.322(A)(5).....29

O.R.C. 2907.323(A)(3).....9,37
39,42,45,57

P. Schlafly, ed. Pornography Victims 108 (1987).....18

Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Mich. J.L.R., 295, 301 (1979).....16

Shouvlin, Preventing The Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981).....16

CONSENT OF THE PARTIES

Attorneys for Appellant and Appellee have consented to the filing of an amicus curiae brief by Children's Legal Foundation. (Appendix A).

INTEREST OF AMICUS CURIAE

Children's Legal Foundation, Inc. (CLF), formerly Citizens for Decency through Law, Inc., is a non-profit legal organization founded in 1957. The Foundation exists to assist public officials in the enforcement and drafting of constitutional obscenity and child pornography laws. It also provides legal assistance to victims of pornography, especially child victims. CLF provides public information on legal and social issues related to pornography, and on sexual exploitation

and victimization by pornographers. The Foundation has a legal staff of attorneys practicing exclusively in the First Amendment/pornography area. CLF has filed more than 50 amicus curiae briefs with this Court on virtually every major obscenity and child pornography issue before this Court in the past three decades. CLF attorneys have participated in trials and appeals in more than 40 states. It has more than 120 affiliated chapters across the nation representing approximately 100,000 supporters.

The Foundation's Executive Director Alan E. Sears is the former Executive Director of the Attorney General's Commission on Pornography. In that capacity he oversaw and supervised the drafting of the Final Report with its Recommendation Number 45 that states adopt laws prohibiting the possession of

child pornography. The Commission, after more than two years of examining the issue from legal, moral, clinical, social scientific, and other relevant perspectives, concluded that possession of child pornography is so intimately connected to the acts of child molestation depicted that a prohibition on possession of such material was required.

Children's Legal Foundation is profoundly concerned with the victimization and exploitation of children by child pornographers. It believes the Ohio law at issue is a constitutional and necessary method of deterring the child abuse and molestation involved in every child pornography case.

INTRODUCTION

The harm inflicted upon children by child pornography gives the states a "surpassing" interest in regulating production, distribution and possession of the material.

Each time child pornography is produced, a child is sexually exploited. Reproductions of these acts are "crime scene photographs" and distribution of them constitutes continued exploitation of the child involved. The photographic reproductions are a permanent record of the abuse suffered by the children involved. They fear discovery by loved ones and blackmail by the producers and possessors of the photographs. In addition, child pornography in and of itself is an instrument of abuse. Pedophiles and other child molesters show this material to their intended

victims in an effort to portray such conduct as normal. There are no "innocent collectors" of child pornography. A child's constitutional right to privacy is violated by the production, reproduction, distribution and possession of the material.

Because of the pervasive nature of the extreme harm inflicted upon our society by child pornography, a state may constitutionally prohibit possession of child pornography. In determining that child pornography is outside of the scope of protection of the First Amendment, this Court recognized that states have greater leeway in the regulation of pornographic depictions of children. New York v. Ferber, 458 U.S. 747 (1982). The state has a compelling interest in safeguarding the physical and psychological well-being of children. The distribution of

photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of those children. The advertising and selling of child pornography provides an economic and social motive for the production of those materials. The value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest. Recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with prior judicial precedent. See Ferber, supra.

All of the reasons above stated, for allowing the prohibition of production and distribution of child pornography also apply to its possession. The market for child pornography cannot be dried up without

curbing demand for the "product." By criminalizing possession and treating it as a form of contraband, the states can substantially "dry up" the market by lowering demand and taking away the economic and social incentives of the producers and distributors.

Criminalizing possession of child pornography does not violate the possessors right to privacy. Although the Constitution extends special safeguards to the privacy of the home, that protection is not without limitation. In Stanley v. Georgia, 395 U.S. 557 (1969), this Court found the constitution proscribed prosecution for possessing certain "obscene" materials, but did not express an opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials or in other locations than the home. Since that time, the

Court has viewed Stanley, supra, as explicitly narrow and precisely delineated; and has not been disposed to extend the precise, carefully limited holding of Stanley, supra.

There are additional constitutional concerns raised in the instant case that were not present in Stanley, supra. Stanley, supra weighed the interest of a possessors right to privacy in his own home against the right of the state to protect society from obscene material and to protect the individual's mind from the effects of obscenity. This case involves a persons right to privacy in his home as against state's surpassing interesting to protect its children from harm and the victim children's right to privacy. The balance of these interests must be struck in favor of the compelling

interest of the state and the privacy rights of the children.

Ohio constitutionally prohibited possession of certain types of child pornography in enacting O.R.C. 2907.323(A)(3). The Ohio Supreme Court authoritatively construed the statute to conform to the Constitution. The construction given the statute narrowed it, making it more difficult for the state to obtain a prosecution.

The Ohio statute is constitutional as applied to Appellant. Appellant objects to the Ohio Supreme Court's construction of the term "minor." However, he fails to note that under either possible construction, (as discussed hereinafter, p. 39) the children depicted in the pictures he possessed were minors. (The children depicted were 14 years old or younger.) Ohio Supreme Court did not "add a

scienter requirement" as claimed by Appellant. Such a requirement was already part of the statutory scheme. By noting that minors depicted in a state of nudity involved a "lewd exhibition" or a "graphic focus on the genitals", the Ohio Supreme Court properly construed the statute to meet constitutional requirements as set forth in New York v. Ferber, supra.

The statute is not substantially overbroad. This Court noted in Ferber that the overbreadth doctrine is "strong medicine", that it is employed with hesitation, and then only as a last resort. Application of the doctrine becomes even more attenuated where, as here, behavior moves from "pure speech" toward conduct and the conduct is within valid criminal laws that reflect a legitimate state interest. Appellant

has failed to demonstrate that the Ohio statute is substantially overbroad.

The fact that Appellant was convicted prior to the construction of the statute by the Ohio Supreme Court does not relieve him from the consequences of his conduct. Where a state appellate court adopts a limiting construction of a statute to cure overbreadth, that statute may be applied to conduct occurring prior to the construction, as long as the application affords fair warning to the Defendant. Appellant clearly had fair warning that his conduct would violate the statute.

Due to the great harms inflicted by child pornography, and the states surpassing interest in regulating it, possession can be constitutionally regulated. The Ohio statute is such a constitutional regulation of child pornography.

ARGUMENT

I. THE STATES HAVE A "SURPASSING" INTEREST IN REGULATING CHILD PORNOGRAPHY BECAUSE OF THE GREAT HARM IT INFLICTS UPON OUR CHILDREN.

The harm of child pornography extends far beyond the harm caused to the children injured in the production of the material. Child pornography should be treated as contraband and its mere possession should be a crime.

Pedophiles and child abusers use this material to draw children into a "cycle of pornography." First, pornography is shown to the child for "sex education." Second, pedophiles attempt to convince the child that explicit sexual activity is acceptable, even desirable. Third, the material is used to convince the child that other children are sexually active. Fourth, child pornography desensitizes; it

lowers a child's inhibitions. Fifth, some of these sessions progress to sexual activity. Sixth, photographs or movies are taken of the sexual activity. Finally, those photographs or movies are shown to other children, thus completing the cycle. Final Report of the Attorney General's Commission on Pornography, page 138 (See Appendix B).

This is not merely a discrete, limited threat. FBI Special Agent Kenneth Lanning, a noted expert in investigation of child sexual abuse, testified before the Attorney General's Commission on Pornography that pedophiles, "may be small in number, [but] they are a very serious threat to our society because they have a potential for large numbers of victims.... My experience has been [that] ... all preferential molesters or pedophiles ... collect child pornography

and/or child erotica...." Testimony of Special Agent Kenneth Lanning, Attorney General's Commission on Pornography hearing, Miami, Florida, 11/20/85, pages 230, 232.

This Court has noted that "[T]he use of children as...subjects of pornographic materials is very harmful to both the children and the society as a whole." (citation omitted). "It has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, have sexual disfunctions, and have a tendency to become sexual abusers as adults." (citation omitted). New York v. Ferber, 458 U.S. 747, 758 fn 9 (1982).

A. Child Pornography Is Produced By Sexually Exploiting A Child

Whenever child pornography is produced, a child is sexually used, physically abused or injured and

emotionally scarred. The use of a minor for most sexual activities is proscribed by state laws. Reproductions of these acts are "crime scene photographs." Many of the sexual acts depicted in child pornography are criminal even aside from the age of the minor children; for example many states still proscribe bestiality, sadomasochistic sexual acts, and various forms of sodomy. (See for example the Georgia and Virginia state criminal codes.)

B. Child Pornography Creates A Permanent Record Of Abuse Of The Children Involved

"Pornography poses an even greater threat to the child victim than does sexual abuse or prostitution. Because the child's actions are reduced to a recording, the pornography may haunt him in future years, long after the original misdeed took place. A child who has posed for a camera must go through life

knowing that the recording is circulating within the mass distribution system for child pornography." New York v. Ferber, supra at 759, fn 10 quoting Shouvlin, Preventing the Sexual Exploitation of Children: A Model Act, 17 Wake Forest L. Rev. 535, 545 (1981). "It is the fear of exposure and the tension of keeping the act secret that seem to have the most profound emotional repercussions." Note, Protection of Children From Use in Pornography: Toward Constitutional and Enforceable Legislation, 12 U. Mich. J.L.R., 295, 301 (1979).

In addition to the fear that a loved one may discover the material, a child may also, fear blackmail from the producer, collectors, or other adults; a fear that they will be forced to perform further acts lest the prior photographs be revealed. In recent years the

"exposure" and resulting harm even to adults who posed at an earlier age is well known. (One well known example is Miss America, Vanessa Williams v. Penthouse, see U.S.A. Today, July 4, 1986 (Life) at 1, Col. 1.

This continuing threat exacerbates the original harm; it is a separate and distinct harm, a continued molestation and abuse of the child.

C. Child Pornography Itself Is An Instrument Of Abuse

Pedophiles and other child molesters show child pornography to their intended victims in an effort to portray sexual conduct by children as normal conduct, something that other children do and enjoy. It is an attempt to reduce a child's natural inhibitions to such behavior. Pedophiles also use child pornography as an instructional tool. One victim, Mary Steinman,

described the abuse she received from her father as follows:

> He would look at his porno pictures almost every day, using them to get ideas of what to do to me or my siblings. I have had my hands tied, my feet tied, my mouth taped to teach me big girls don't cry. He would tell me I was very fortunate to have a father that would teach me the facts of life.
>
> My father had an easel that he put by the bed. He'd pin a picture on the easel and, like a teacher, he would tell me, This is what you're going to learn today. He would then act out the picture on me. As early as the age of four; my father would rent me out to other people for the purpose of sex.

P. Schlafly, ed. Pornography's Victims 108 (1987).

"The act of selling these materials [guarantees] that there will be an additional abuse of children." Ferber, supra, at 761, fn 13. (citation omitted)

D. Child Pornography Is Used For Illicit Purposes By Possessors

There are few, if any, "innocent collectors" of child pornography. It is used to aid in the sexual fantasies, to assist in masturbation and other forms of gratification of the possessor, and is used to lure and instruct child victims. The photographs which the offender possesses are records of a real child who was traumatized, terrorized, used and abused. In our society, there is no legitimate use for child pornography.

E. Production, Distribution And Possession Of Child Pornography Violates Legitimate Privacy Interests Of The Children Abused

"The victims' knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child. (citation omitted) Thus, distribution of the material violates the individual interest in avoiding disclosure of personal matters." (citation omitted)

Ferber, supra, at 759, fn 10. The victims privacy rights are violated repeatedly as the photographs are circulated, collected, used and reused by the pedophiles and child pornographers and continually distributed throughout the child pornography network.

Child pornography inflicts numerous, severe and continuing harms upon America's children and their privacy interests. Children cannot consent to either the sexual abuse or the photography. Pedophiles and child pornographers violate the children, photograph their violations for use in sexual gratification, and use those photographs to entice other children into this cycle of pornography. It is hard to imagine a more objectionable use of the most private parts of a child's body. The need to prevent these evils

gives the states a surpassing interest in protecting children by drying up the market for child pornography through regulation.

II. A STATE MAY CONSTITUTIONALLY PROHIBIT POSSESSION OF CHILD PORNOGRAPHY

This Court noted in Ferber, supra, the relationship between the distribution of photographs and films depicting sexual activity by children and the sexual abuse of those children. Id. at 761, fn 13. The only practical way to end this abuse is to dry up the marketplace of child pornography by "imposing severe criminal penalties on persons selling, advertising or otherwise promoting the product." Id. at 760. Possession is an integral, indeed the most important link in the child pornography chain. The mere existence of a "marketplace" creates a demand for more photographs which

creates a demand for more abuse which extends in an ever growing cycle.

This court has recognized that the state has a compelling, indeed a surpassing interest in stopping the production and distribution of child pornography. Id. at 757. Numerous courts have recognized that the only method of accomplishing this objective is to dry up the market. Felton v. State, 526 S.2d 638 (Ala. 1988), State v. Davis, 768 P.2d 499 (Wash. 1989), State v. Meadows, 503 N.E.2d 697 (Ohio 1986), People v. Geever, 522 N.E.2d 1200 (Ill. 1988). Although Ferber, supra was decided in the context of distribution of child pornography, the same problems exist and the same reasoning applies to the possession of child pornography.

A. The Ferber Rationale That Child Pornography Is Outside The Scope Of The First Amendment Permits States To Prohibit Possession Of Child Pornography.

Child Pornography is completely outside the scope of the protection of the First Amendment; it is an evil that the states may restrict. The inherent evils of child pornography overwhelmingly outweigh the "expressive interests" (if any) at stake. There is no valid argument that child pornography should have the protection of the First Amendment.

This Court began its First Amendment analysis of the child pornography issue in Ferber, supra, by noting that the test for obscenity as stated in Miller v. California, 413 U.S. 15 (1973) does not apply to child pornography. The Court recognized that the states have greater leeway in the regulation of pornographic depictions of children because: (1) the state has a compelling interest in safeguarding the physical and psychological well being of

a child; (2) the distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of those children; (3) the advertising and selling of child pornography provide an economic motive for the production of those materials; (4) the value of permitting live performances and photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis; and (5) recognizing and classifying child pornography as a category of material outside the protection of the First Amendment is not incompatible with the Courts earlier decisions.

This Court found that the evil to be restricted so overwhelmingly outweighs the expressive interest, if any, at stake, that no process of case by case adjudication is required. "When

a definable class of material ... bears so heavily and pervasively on the welfare of children engaged in its production,...the balance of competing interest is clearly struck and...it is permissible to consider these materials as without the protection of the First Amendment." 458 U.S. at 764.

This analysis is directly and appropriately applicable to the possession of child pornography.

In order to dry up the market for child pornography, the state must be able to reach the possessor, the last, but most important link in the chain. As long as there is demand for this material, it will exist. By punishing the end user, the consumer, the possessor, the one who creates demand, greater strides can be made toward drying up the marketplace than through

prevention or production and distribution alone.

Just as the production of child pornography is intrinsically related to child abuse, so is the possession. As noted in Section I, possessors of child pornography are often pedophiles and other child abusers who use the material to lower the inhibitions of their victims and to instruct their victims in forms of sexual humiliation, violence and abuse.

By criminalizing the possession of child pornography, by treating it as a form of "contraband", the states can further dry up the market by lowering demand and taking away the economic and social incentives of the producers and distributors. In addition, the production and distribution network and the class of possessors are not independent, but interrelated. Child

pornography is viewed as a commodity among pedophiles and child pornographers. Visual depictions are traded and sold between possessors. Final Report of the Attorney General's Commission on Pornography, page 150 (1986). Since these relationships are intertwined, the states can take away economic and social incentives and slow the distribution of child pornography by criminalizing possession.

As with production and distribution, the value of permitting possession of photographic reproductions of children engaged in lewd sexual conduct is exceedingly modest, if not de minimis. Just as there are no legitimate reasons for production and distribution, there is no legitimate reason for possession.

Finally, recognizing and classifying possession of child

pornography as conduct unprotected by the First Amendment is not incompatible with this court's earlier decisions, including Stanley v. Georgia, 394 U.S. 557 (1969).

B. Criminalizing Possession Of Child Pornography Does Not Violate The Possessor's Right To Privacy

The Illinois Supreme Court noted in People v. Geever, supra, that, although the constitution extends special safeguards to the privacy of the home, that protection is not without limitation. 522 N.E.2d at 1205; (relying on Bowers v. Hardwick, (1986), 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140). Bowers held that the due process clause of the Fourteen Amendment does not confer a right of privacy to homosexuals to commit sodomy in the privacy of their homes.

Twenty states now have statutes criminalizing the private possession of

sexually explicit pictures of minors. The Ohio Supreme Court registered the first major decision on the validity of the possession statutes in State v. Meadows, 28 Ohio State 3rd 43, 503 N.E.2d 697 (1986) cert. denied 480 U.S. 936 (1987). The Ohio statute upheld in Meadows, O.R.C. 2907.322(A)(5) prohibits the possession of a photo of a minor "engaging in sexual activity" without requiring it to be obscene.

Both the defendant in Meadows, supra, and the defendant herein invoked this court's decision in Stanley v. Georgia, supra, in an attempt to wrap their conduct in constitutional protection. However, Stanley only protected the right to be free from prosecution for merely possessing "obscene" materials (pictorial or literary) within the home. As stated in Meadows, 503 N.Ed.2d at 700;

Thus, Stanley has always stood for -- and still stands for -- the proposition that the state may not, consistent with the First Amendment, regulate the mere private possession of material in one's own home merely because it is obscene. However, it is also significant to our inquiry that Justice Marshall cautioned at footnote 11 of his majority opinion in Stanley that the court did not '... mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.'" (emphasis added) Id. 394 U.S. at 568. Rather, it was recognized in the Stanley opinion that there could be cases involving other subjects where "...compelling reasons may exist for overriding the right of the individual to possess those materials." (emphasis added) Id. [emphasis by the court in Meadows]

The compelling reasons listed by this Court in Ferber, supra, for allowing the prohibition of production and distribution of child pornography also apply to the possession of child pornography and provide the compelling

reason for overriding the right of the individual to possess materials in his own home. Child pornography is exactly the type of "other types of printed, filmed, or recorded materials" which were not included under the protection of Stanley, supra. Though much material that is obscene involves abuse to the performers, and has other anti-social aspects, child pornography always involves harm to children for its production. This Court has categorically rejected the argument that Stanley, supra, should be extended beyond the specific facts of that case. In United States v. 12-200 Foot Reels, 413 U.S. 123, at 127-28 (1973), the Court ruled that Stanley, supra, is to be viewed as "explicitly narrow and precisely delineated"; the court was "not disposed to extend the precise, carefully limited holding of Stanley."

This court also emphasized the narrowness and limits of the Stanley, supra, holding in Paris Adult Theatre I v. Slaton, 413 U.S. 49, 66-69 (1973).

Possession of child pornography does not raise the same constitutional concerns found in Stanley, supra. There, the court weighed the privacy interest of the possessor against the state's interests in protecting society from obscene material and to protect the individual's mind from the effects of obscenity and struck the balance in favor of the possessor of obscene material. Not only are the states' interests more compelling in regulating child pornography (Ferber, supra, at 757); but the competing privacy interests of the possessor and of the children involved must also be considered.

Children are legally incapable of consenting to their participation in the production of child pornography. Each time the material is reproduced, distributed, possessed or viewed, the child's right to privacy is violated. Therefore, the court must weigh the possessor's right to privacy not only against the state's compelling interest in protecting its children, but against the child's right of privacy. This Court has acknowledged that the victim's knowledge of publication of the visual material increases the emotional and physic harm suffered by the child and the fact that distribution of the material violates the individual interest in avoiding disclosure of personal matters. Ferber, supra, at 759, fn 10.

The balance of these interests must be struck in favor of the compelling

interest of the state and the privacy rights of the children and against the privacy rights of the possessor of child pornography.

The Ohio Supreme Court weighed the competing interests in State v. Meadows:

> We believe the interest of the state in protecting the privacy, health, emotional welfare and well-rounded growth of its young citizens, together with its undeniable interest of safeguarding the future of society as a whole, comprise exactly the type of 'compelling reasons' justifying a 'very limited' First Amendment intrusion envisioned by the Stanley court. At the same time, the cost to the individual possessor's right of free speech, privacy and thought, caused by the state's banning of visual momentous from an episode of sexual abuse of a child, is slight. Moreover, the content value of such material is trifling and alternative means of stimulation exists."

503 N.E.2d at 703. In our political history and under our law, the home has been regarded as a shielded place of

privacy. There are circumstances, however, which call for the individual's right to this sanctuary to be balanced against critical interests of society. For example, the person has no right to possess narcotics, heroin and other forms of contraband, even in the home. Child pornography should be similarly viewed as contraband.

When considering child pornography, the individual's assurance of full freedom of conduct in the home must yield, consistently with the Supreme Court's holding in Bowers v. Hardwick, supra, to society's "most compelling" interest to protect its children from the lasting harm of emotional and sexual degradation. People v. Geever, supra, at 1206.

Possession has been described as the most important link in the chain of distribution of child pornography. Id.

at 1206. The Attorney General's Commission on Pornography reviewed the factual and legal situation regarding child pornography and recommended that all 50 state legislatures amend laws, where necessary, to make the knowing possession of child pornography a felony. As noted above many state legislatures have followed the recommendation. Final Report of The Attorney General's Commission on Pornography, Recommendation 45, 150. See Appendix C, (1986).

Criminal punishment for the knowing possession and collecting of sexually explicit pictures of minors is necessary to prevent the further exploitation of those children whose permanent record of abuse forever haunts their privacy and mental health, and is necessary to prevent the use of the pictures to facilitate the seduction of other

children by the possessor and user of collections of these crime scene photos. These objectives require the possessors limited privacy interests to yield.

III. THE OHIO CHILD PORNOGRAPHY POSSESSION STATUTE, O.R.C. 2907.323(A)(3) IS CONSTITUTIONAL AND VALIDLY CRIMINALIZES NON-PROTECTED CONDUCT.

The Appellant has attacked the Ohio statute as constitutionally invalid as overbroad and as applied to him. None of the purported infirmities raised by Appellant withstand scrutiny.

A. The Ohio Supreme Court Authoritatively Construed Ohio Law In A Constitutional Manner

Appellant has challenged his conviction based on his claim that the Ohio Supreme Court "re-wrote" O.R.C. 2907.323(A)(3). However, Appellant fails to distinguish between a re-writing of a statute by a court and an authoritative construction of that statute.

As an initial matter, it should be noted that a full and authoritative construction of a state statute by the highest court of that state finds this court, for which the words of the state's highest court are in effect the words of the statute. N.A.A.C.P. v. Button, 371 U.S. 415, 417 (1963). Therefore, the issue before the court is not whether the Ohio court "re-wrote" the state statute, but whether the statute as authoritatively construed meets the requirements of the Constitution.

It will be presumed that the legislature acted in light of the provisions of the Constitution and did not propose to act inconsistently with its protections. Accordingly, a court must construe a statute as not offending the Constitution, provided the

construction is a reasonable one. People v. Geever, supra, at 1205.

In upholding the conviction of Osborne, the Ohio Supreme Court reasonably construed O.R.C. 2907.323(A)(3) to meet the constitutional requirements as enunciated in Ferber: the conduct to be prohibited is adequately defined and scienter is required on the part of the Defendant.

1. The Ohio Supreme Court Properly Construed The Term "Minor"

It is not required that every word of a statute be precisely defined. Pursuant to Ohio law, a term undefined by statute is to be accorded its common, everyday meaning. O.R.C. Section 1.42. The Ohio Supreme Court acted properly in defining a minor as a person below the age of eighteen, that being the accepted definition of the term "minor." Appellant attempts to demonstrate that

minority can mean something other than "below the age of eighteen" by citing O.R.C. 2907.04. However, that statute defines the age of consent for certain specified acts in Ohio, and does not attempt to define the term minority for all purposes. The mere fact that a legislature might not make it non-criminal or criminal to engage in certain acts between the ages of 16 and 18 or 18 and 21 years of age does not therefore limit the legislatures power to prohibit photographing, distributing or possessing photographs of such acts. As stated above, photographs may be even more harmful than actual sexual activities with or abuse of a child.

Appellant states that "had [he] known at the time of the trial the age of minority..., he might have made different decisions as to how to present his defense." This assertion cannot

withstand even the mildest scrutiny. No matter which definition of minority the Ohio Supreme Court adopted, the pictures possessed by Appellant involve children under the age of fifteen (record at 54 - see Appellee's Statement of the Case which is below any definition of "minority" under Ohio law thus obviating the need for any alleged "change in defensive tactics" based on the definition of "minor."

2. <u>The Ohio Supreme Court Properly Interpreted The Statutes Scienter Requirement</u>

Although O.R.C. Section 2907.323 is silent on the issue of scienter, O.R.C. Section 2901.21(B) provides that when a section defining a criminal offense does not specify a specific degree of mental culpability, a mental state of "recklessness" is required for the person to be guilty of the offense, unless there is a plain indication to

impose strict liability. Thus the statute meets the requirement that, in order to impose that criminal responsibility, there must be some element of scienter on the part of the defendant. New York v. Ferber, supra, at 765. The Ohio Supreme Court added no new provision nor added or changed any language; it merely read the statutory scheme as a whole and applied the scienter requirement as provided by Ohio statutes.

3. **The Ohio Supreme Court Properly Construed The Statute To Meet Constitutional Requirements By Applying The Statute Only When The Nudity Constitutes A "Lewd Exhibition" Or Involves A Graphic Focus On The Genitals**

The Ohio Supreme Court construed the elements of O.R.C. Section 2907.323(A)(3) to be consistent with the requirements of New York v. Ferber.

The statute states as follows: Illegal use of minor in nudity -

oriented material or performance. (A) No person shall do any of the following: (3) possess or view any material or performance that shows a minor who is not the persons child or ward in a state of nudity,...." The Ohio Supreme Court held that the statute as written was "not so broad as to outlaw all depictions of minors in a state of nudity, but rather only those depictions that constitute child pornography." This reading follows directly from the language of the statute prohibiting "nudity - oriented material or performance." This must mean something more than "mere nudity." The Ohio Supreme Court construed the terms as consistent with the United States Constitution. It defined it as "...such nudity constitutes a lewd exhibition or involves a graphic focus on the genitals,...where the person depicted is

neither the child nor the ward of the person charged. State v. Young, 525 N.E.2d 1363, 1368 (1988). The Court arrived at this definition by reviewing the statute and the exceptions to the prohibited conduct:

> It is true that [the statute] does not expressly limit the prohibited state of nudity to a lewd exhibition or a graphic focus on the genitals. Furthermore, we are aware that '...nudity, without more is protected expression...,' even where the subject depicted as a child [citing New York v. Ferber]. However, when the 'proper purposes' exceptions set forth in R.C. 2907.323(A)(3)(a) and (b) are considered, the scope of the prohibited conduct narrows significantly. The clear purpose of these exceptions...is to sanction the possession or viewing of material depicting nude minors where that conduct is morally innocent. Thus, the only conduct prohibited by the statute is conduct which is not morally innocent, ie., the possession or viewing of the described material for prurient purposes. So construed, the statutes proscription is not so broad as to outlaw all depictions of

> minors in a state of nudity, but rather only those depictions which constitute child pornography.' Id. at 1357.

The statute as construed by the Ohio Supreme Court prohibits conduct which constitutionally may be proscribed. The statute upheld in Ferber, supra, prohibited "lewd exhibition of the genitals." Thus nudity can be prohibited, consistent with the Ferber, supra decision. The construction of the Ohio Supreme Court is plainly within such meaning.

B. O.R.C. Section 2907.323(A)(3) Is Not Substantially Overbroad

The Appellant asserts that the statute is substantially overbroad, citing Broadrick v. Oklahoma, 413 U.S. 601 (1973). The Appellant's assertion is erroneous.

As an initial matter, it should be noted that the statute may be constitutionally applied to this

Appellant. Although Appellant tries to "soft peddle" the nature of the pictures involved in its conviction as "nude pictures" in his "personal photo album" the pictures were of total strangers to Appellant.

> The brown photo album contained numerous photographs of nude males of various ages and Osborne admitted that he had taken some of those photographs. (Joint Appendix of the judgment rendered by the Ohio Supreme Court 12: hereinafter J.A.).
>
> * * *
>
> State's Exhibits 1A through 1C were Polaroid photographs, and State's Exhibit 1D had the notation on the back of the photograph of "Tommy - 13". (J.A. 9,11).
>
> State's Exhibits 1A through 1C depict the same young male child on a bed in various poses, which child Osborne stated was 14 years of age when the photographs were taken. (J.A. 13, 14, 16).
>
> In State's Exhibit 1A the 14 year old boy is depicted laying on his back in a provocative pose in a bed with his legs spread apart, and

with an erect penis that Osborne described as a "hard on" (J.A. 20). The boy is holding something in his hand that Osborne described as electrical, with a cord attached to it. (J.A. 20).

State's Exhibit 1B depicts the same 14 year old boy in an almost gymnastic pose on the bed with his hands behind his head and his arms looped between the inner part of the knee with his stretched and exposed anus in graphic focus.

In State's Exhibit 1C this 14 year old boy is depicted on the bed with his legs spread-eagled and in one of his hands placed into his anus is an item Osborne identified as a "dildoe", but noted that "you can't tell from the picture whether there's any penetration." (J.A. 21). On the bed in this shot is the same electrical device shown in State's Exhibit 1A that Osborne said looks like a sander. (J.A.21).

State's Exhibit 1D is a photograph of a different boy who is standing with his hands placed on his hips and a graphic focus on the male genitals. This photograph depicts the boy only between the shoulders and the knees. (J.A. 9). On the back of this Exhibit is the notation "Tommy - 13". (J.A. 9, 19). The

background in this photo matches the background in the three Polaroid photos of the 14 year old boy.

* * *

Osborne did not know the young boys in these photographs, and he was not their parent or ward. (J.A. 22).

Osborne mounted these four photos in his brown photo album, kept these photographs for at least three years, and periodically looked at them. (J.A. 15-16).

See, Appellees Statement of the Case.

In Ferber, supra, at 771, the court held that the substantial overbreadth doctrine of Broadrick v. Oklahoma, supra, applies to the First Amendment analysis of child pornography legislation. The court further noted that "the scope of the First Amendment overbreadth doctrine, like most exceptions to established principles, must be carefully tied to the circumstances in which the facial

invalidation of a statute is truly warranted. Because of the wide-reaching effects of striking down a statute on its face at the request of one whose conduct may be punished despite the First Amendment, we have recognized that the overbreadth doctrine is 'strong medicine' and have employed it with hesitation, and then only as a last resort." Ferber, supra, at 769. The application of the overbreadth doctrine becomes even more attenuated where, as here, behavior moves from "pure speech" toward conduct and the conduct is within valid criminal laws that reflect a legitimate state interest. "Although such laws, if too broadly worded, may deter protected speech to some unknown extent, there comes a point where that effect -- at best a prediction -- cannot, with confidence justify invalidating a statute on its face and

so prohibiting a state from enforcing the statute against conduct if its admittedly within its power to proscribe. Id. at 770. Such a law should not be held invalid for overbreadth unless it reaches a substantial number of impermissible applications. Id. at 771. As noted by Justice Scalia in his concurrence in Massachusetts v. Oakes, 491 U.S. ___, 105 L.Ed.2d at 505 (1989), "it is the burden of the person whose conduct is legitimately proscribable, and who seeks to invalidate the entire law because of its application to someone else to 'demonstrate from the text of [the law] and from actual fact' that substantial overbreadth exists.'" New York State Club Association v. New York City, 487 U.S. ___, 101 L.Ed.2d 1, 108 S.Ct. 2225 (1988) (emphasis added). Appellant has failed to demonstrate from the text and

from actual fact that the Ohio statute, as authoritatively construed by the Ohio Supreme Court "reaches a substantial number of impermissible applications."

"Facial overbreadth has not been invoked when a limiting construction has been or could be placed on the challenged statute." Broadrick, supra at 613. Broadrick, upheld a constitutional challenge to political limitations on Oklahoma public employees and discussed at length the effect of a finding of "overbreadth" on the enforcement of a statute. As noted in Broadrick, where the construction of a statute creates a narrower standard it can continue to be enforced.

In the landmark case of Roth v. United States, 354 U.S. 476 (1957), wherein this Court first fashioned a modern test for obscenity, the Court upheld obscenity convictions of two men,

one under federal law and the other under a California statute. Both laws were very broadly written. The federal law prohibited every "obscene, lewd, lascivious, or filthy book, pamphlet, picture, paper, letter, writing, print, or other publication of an indecent character" from being mailed. Roth, supra, at 479, n.1. The California law prohibited the production, sale or advertising of any "obscene or indecent" material. Id., n.2. This Court in Roth limited prosecution to "obscene" material that met this test: "whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." That definition was more narrow than the statutes under which the defendants were charged and convicted. Yet the Court affirmed the convictions despite

announcing for the first time that very day a new constitutional standard.

Roth is directly applicable here. In this case, if the Appellant "charted his course of conduct" by the pre-Ohio Supreme Court construction of the statute, he could not possibly be prejudiced by prosecution under the constructive definition. It should be noted the the Ohio Supreme Court decision places a greater burden on the state and causes no prejudice to the Appellant.

Also see Pope v. Illinois, 481 U.S. 497, 501-02 (1987).

Nor can the fact that the Ohio Supreme Court construed the statute after conviction relieve Appellant from the consequences of his conduct. Where a state appellate court adopts a limiting construction of a statute to cure overbreadth, that statute may be

applied to conduct occurring prior to the construction, as long as the application affords fair warning to the defendant. Dombrowski v. Pfister, 380 U.S. 479, 491, n.7 (1965).

Appellant had fair notice that the conduct he engaged in was prohibited by statute. The pictures involved were not pictures of a "baby on a bear skin rug" but, as described above, involved nude depictions focusing on children with their legs spread apart, erect penises, adjacent dildoes, and exposed anuses.

The "fair warning requirement prohibits the states from holding an individual criminal responsible for conduct which he could not reasonably understand to be proscribed." Rose v. Locke, 423 U.S. 48, 49, (1975). It cannot be doubted that the statute provides sufficient notice that Appellant's conduct is proscribed;

therefore, his right to due process has not been violated.

The terms "lewd exhibition" and "graphic focus on the genitals" are not in themselves overbroad. This Court has already considered the construction to be given to the term "lewd." In U.S. v. 12 200-Foot Reels, 413 U.S. 123, 130 fn 7 (1973), this Court considered the terms "obscene," "lewd," "lascivious," "filthy," "indecent," or "immoral" and stated that "we are prepared to construe such terms as limiting regulated material to patently offensive representations or descriptions of that specific "hard-core" sexual conduct given as examples in Miller v. California, 413 U.S., at 25." Lower courts have also found the term "lewd" readily definable. In U.S. v. Wiegand, 812 F.2d 1239 (9th Cir. 1987) the Defendant contented the term

"lascivious" was vague. The court held that "lascivious" is no different in its meeting than "lewd" a term whose constitutionality was specifical upheld in Miller, supra, and in Ferber, supra.

The term "graphic focus on the genitals" is closely related to the term "lewd." The statute upheld by this Court in Ferber included the term "lewd exhibition of the genitals" within the definition of "sexual conduct." 458 U.S. at 751. The Wiegand, supra, court defined "lasciviousness" as a characteristic of the exhibition and not a characteristic of the child herself; presented by the photographers as to arouse or satisfy the sexual cravings of a voyeur. Thus, the terms in the Ohio statute as construed provide clear limits to the conduct prohibited as required by Ferber, supra. The Ohio Supreme Court authoritatively construed

O.R.C. Section 2907.323.(A)(3) as consistent with the United States Constitution. It did not add any new elements to the crime nor did it re-write the statute in any way.

Appellant also complains because the statute exempts parents and artists. Appellant is neither a parent of the children depicted in his pictures nor a legitimate artist in possession of his work. The exception does not render the statute overbroad because it does not prohibit conduct which must be constitutionally permitted, but permits conduct which may be statutorally proscribed. Although it may not have been wise to exempt the classes exempted, that is a decision left to the legislature. Such exemptions are not uncommon in obscenity statutes. See Ripplinger v. Collins, 868 F.2d 1043 (1988) upholding the constitutionality

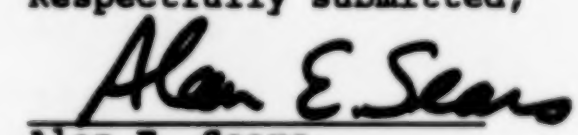
of the Arizona state obscenity statutes exemption of cable television. The following cases have also upheld sundry exemptions for clerks, projectionists, churches, schools, universities, libraries and museums on any one of several legislative goals. State v. Martin, 719 S.W.2d 522 (Tenn. 1986); 4000 Asher, Inc. v. State, 716 S.W.2d 190 (Ark. 1986); Com. v. Stock, 499 A.2d 308 (Pa.Super 1985); State v. Baker, 711 P.2d 759 (Kan.App. 1985); Com v. Ferro, 372 Mass. 379, 361 N.E.2d 1234 (1977); In re Kimbler, 100 Cal.App.3rd 453, 161 Cal.Rptr. 53 (1979); Com. v. Bono, 7 Mass.App. 849, 384 N.E.2d 1260; People v. Illardo, 48 N.Y.2d 408, 423 N.Y.S.2d 470, 399 N.E.2d 59 (1979); State v. Lesieure, 121 R.I. 859, 404 A.2d 457 (1979); State v. J.R. Distributors, Inc., 82 Wash.2d 584, 512 P.2d 1049 (1973). Indeed, various exemptions from

state obscenity statutes are the rule, not the exception. And see, A.L.I. Model Penal Code and Commentaries, § 251.4(3), Appendix B.

CONCLUSION

For the foregoing reasons, the Court should uphold The Ohio legislature's judgment that possession of child pornography should be ciminal, O.R.C. 2907.323(A)(3).

Respectfully submitted,



Alan E. Sears
2845 E. Camelback Rd.
Suite 740
Phoenix, AZ 85016
(602) 381-1322

Counsel for
Amicus Curaie

CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Amicus Curiae Children's Legal Foundation have been sent by U.S. Mail, Postage Prepaid, on this 7th day of September, 1989, to:

RANDALL M. DANA
S. ADELE SHANK
Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, Ohio 43266-0587

JOHN QUIGLEY
DAVID GOLDBERGER
Clinical Programs
The Ohio State University
College of Law
1659 North High Street
Columbus, Ohio 43210

RONALD J. O'BRIEN
City Attorney
City Hall
90 West Broad Street
Columbus, Ohio 43215

All parties required to be served have been served.

Alan E Sears

ALAN E. SEARS
Counsel for
Amicus Curiae

APPENDIX A

Children's Legal Foundation

"protecting the innocence of children"

August 23, 1989

S. Adele Shank
Assistant Ohio Public Defender
Ohio Public Defender Commission
8 East Long Street - 11th Floor
Columbus, OH 43266-0587

Re: Osborne v. Ohio, No. 88-5986

Dear Ms. Shank:

I am Legal Counsel for Children's Legal Foundation, a national, non-profit public interest corporation based in Phoenix. CLF has a 32-year history of opposing child pornography and obscenity, frequently in the U.S. Supreme Court, and desires to file an amicus curiae brief in support of the State of Ohio in the above-styled case. Pursuant to Rule 36 of Rules of the Supreme Court of the United States, I am seeking your written consent to our filing such a brief.

Please use the return Federal Express envelope provided to let us know of your decision. Thank you for your prompt attention to this matter.

Sincerely,

Len L. Munsil
Legal Counsel

LLM/lak

Enclosures

I do X do not ____consent to the filing of an amicus curiae brief by Children's Legal Foundation in Osborne v. Ohio, No. 88-5986.

S. Adele Shank
Assistant Ohio
Public Defender

APPENDIX B

C H A P T E R

1 1

Child Pornography

INTRODUCTION

No clearer measure exists of the radical shift in the issues confronted by the Commission on Obscenity and Pornography in 1970 and those facing this one than the problem of child pornography. In its description of "the industries" producing sexually explicit material the 1970 Commission nowhere mentioned or alluded to child pornography,[307] and its Traffic and Distribution Panel reported that "the taboo against pedophilia . . . has remained almost inviolate" even in the hardest of "hard-core" materials.[308] The recommendations of the 1970 Commission included repeal of all laws restraining distribution of sexually explicit materials to children; no exception was stated for materials depicting children engaged in sexual conduct.[309]

This Commission, by contrast, has devoted a very substantial proportion of its time and energy to examining the extent and nature of child pornography. Indeed, one set of the Commission's hearings was devoted almost entirely to the problem, while extensive oral and written testimony on the subject was received throughout the year. No aspect of the pornography industry has more occupied the attention of Congress and the general public during the past decade, and this Commission has made a wide range of recommendations

for further legislative and public action. The very novelty of child pornography as a matter for public concern, however, requires at least a general overview of the rise of the "kiddie porn" industry, the nature of and the rationale for the governmental response to it, the effects on the children involved, and the contours of the industry's surviving components. That overview must begin with attention to what "child pornography" by definition *is* and what it is not.

Drawings of children engaged in sexual intercourse with adults date at least from ancient Greece,[300] and a graphic written description of child sexual abuse was to be found in seventeenth century France.[301] Yet although these portrayals or accounts might be deemed "obscene," and although they deeply offend modern sensibilities regarding the rearing and protection of children, they are not "child pornography" in the specific legal and clinical sense that term has acquired over the past fifteen years. As defined by the United States Supreme Court in the 1982 decision, *New York v. Ferber*, the category of "child pornography" is "limited to works that *visually* depict sexual conduct by children below a specified age."[302] It is clear from the Court's language, and in all statutory and scholarly definitions of the term, that "child pornography" is only appropriate as a description of material depicting *real* children.[303]

The basis for these limitations is evident from the very nature of the outrage child pornography engenders—anger over the sexual abuse of children used in its production. While concern over "pornography" generally has centered on the impact of sexually explicit materials on the *audience*, "child pornography" has been defined, and attacked, in terms of its effects on the children who appear in it. Thus, as the Court found in *Ferber*,

the category of "child pornography" is both broader and narrower than that of "obscenity." Broader in that it includes materials which are not "patently offensive," which do not appeal to the "prurient interest of the average individual, "and which show children in sexual conduct even as an incidental part of the work (rather than "taken as a whole").[206] Narrower, however, in that written materials are wholly excluded, as are visual materials which do not show *actual* children engaged in sexual conduct. Thus a rewrite of *Lolita* which included graphic descriptions of sexual activity with a young girl could never be "child pornography," nor could a fully explicit film of the novel which starred an adult actress playing the part of the young girl. Such a film which used a *minor* actress, however, could be "child pornography" even if not "patently offensive" by prevailing community standards, and (although this is less clear) even if it possessed serious artistic, literary, scientific or educational value.[207] In the context of "child pornography," alone among all the issues considered by the Commission, the definition of "obscenity" proclaimed in *Miller v. California*[208] and its progeny is wholly irrelevant. Indeed, the advent of "kiddie porn" in the years after *Miller* provides vivid illustration of the inadequacy of the concept of "obscenity" for protecting the interests of performers in sexually explicit material.[209]

The irrelevance of *Miller* to child pornography is loaded with some historic ironies, for it was later in the very year of that decision, 1973, that the first child pornography ring—involving some fourteen adults using boys under age thirteen for sex and production of pornographic materials—was brought to public view.[210] In the four years that followed police and reporters uncovered a wide range of activities involving the sexual exploitation of

children, much of it involving child pornography.[399] Early in 1976 two employees of a large Los Angeles corporation publishing sexually explicit magazines were convicted of pandering for hiring a fourteen-year-old girl to engage in numerous acts of photographed sexual intercourse for publication in the company's magazines.[400] Later in that year the Los Angeles Police Department established a special Sexually Exploited Child Unit to combat child pornography and prostitution,[401] and in the spring of 1977 a string of investigative articles in the *Chicago Tribune*, *Time* and other major publications helped prompt a full Congressional investigation of the problem.[402]

What Congress discovered in its hearings—which involved one Senate and two House subcommittees over ten dates and four cities from May to September of 1977[403]—was summarized by the Senate Judiciary Committee in its report:

> Child pornography and child prostitution have become highly organized, multi-million dollar industries that operate on a nationwide scale. . . .[404]

According to evidence at the hearings, those industries were producing some 264 different commercial magazines each month showing children nude or engaged in sexual conduct,[405] and the founder of the Los Angeles Sexually Exploited Child Unit reported that "We have 30,000 sexually exploited children in that city."[406] One producer and distributor was reported to have made five to seven million dollars in his own child-pornography business,[407] while other witnesses before Congress described the kidnapping of small children by pornographers,[408] and even their sale by parents.[409]

Child pornography had, in short, become a part of the commercial mainstream of por-

nography by 1977, sold "over the counter" and in considerable quantities. While a substantial amount of such material was of foreign origin,[410] much of it was made using American children. This wholly unanticipated by-product of the "pornography boom" prompted an angry legislative response from Congress and nearly all state legislatures—a response that in itself seems to have reshaped completely the nature of the child-pornography industry.

The governmental battle against sexual exploitation of children has been an ongoing, evolutionary one, marked by an extraordinary degree of consensus among legislators on both the federal and state levels. Detailed analysis of the wide array of statutes which have resulted from this shared concern is beyond the scope of this report. Nevertheless, a general review of applicable federal statutes, along with attention to significant features of current states, is a crucial backdrop to the Commission's recommendations, and, more importantly to understanding the substantial changes in the child-pornography industry since 1977.

Federal Statutes. Comparison of the two major Congressional acts designed to fight sexual exploitation, approved six years apart, provides perhaps the best evidence of how a changing child pornography industry has taxed legislative ingenuity:[411]

1. *The Protection of Children from Sexual Exploitation Act of 1977 (the "1977 Act").*[412] The immediate response of Congress to the evidence gathered in its 1977 investagations was this law, approved February 6, 1978.

It categorically prohibited the production of any "sexually explicit" material using a child under age sixteen, if such material is destined for, or has already travelled in interstate commerce.[413] The definition of the phrase "sexually explicit" included any

conduct involving sexual intercourse of any variety, bestiality, masturbation, sado-masochistic abuse, or "lewd exhibition of the genitals or pubic area."[414] Stern penalties (10 years imprisonment and/or $10,000 fine) were imposed for violating these provisions,[415] and were made applicable, as well, to parents or other custodians who knowingly permit a child to participate in such production.[416]

With regard to the traffic in child pornography already produced, the 1977 Act took a somewhat different approach. With the evidence gathered at the hearings centering overwhelmingly on the *commercial* character of such traffic, Congress understandably directed its prohibitions against the transportation, shipping, mailing, or receipt of child pornography in interstate commerce "*for the purpose of sale* or distribution *for sale*."[417] Thus bartering or simply giving away child pornography was not prohibited even if conducted through the mail. Further, constitutional concerns led Congress to restrict the application of these provisions to material depicting children engaged in "sexually explicit" activity, which was also "obscene" under the *Miller* test.[418] As under the production provisions, the age limit for children protected was set at sixteen, and the penalties imposed were identical.[419]

2. *The Child Protection Act of 1984* (the "*1984 Act*").[420] Strong as it appeared to be on its face, the 1977 Act was soon found by federal law enforcement officials to be of only limited practical value. The production of child pornography is so clandestine in character that from 1978 to 1984 only one person had been convicted under that portion of the 1977 Act.[421] As for distribution of the material, the traffic in child pornography went underground after 1978, and commercial magazines such as those shown to Congress

in 1977 were no longer available "over-the-counter" in pornography outlets. Rather, as a Postal official told Congress in 1982, the "bulk of child pornography traffic is noncommercial."[422] This meant, as a Federal Bureau of Investigation witness told the same hearing, that federal enforcement of the 1977 Act was "seriously impaired" by its "for sale" requirements.[423] Further, the limitation of the trafficking provision of the 1977 Act to "obscene" child pornography placed substantial obstacles in the path of prosecutors.[424]

Confronted by this evidence, and reinforced by the Ferber decision removing any doubt about the necessity of "obscenity" limitations, Congress in May, 1984, approved a broad revision of the 1977 Act. The Child Protection Act of 1984 removed the requirement that interstate trafficking, receipt, or mailing of child pornography be for the purpose of "sale" to be criminal.[425] Further, it wholly eliminated the "obscenity" restrictions of the 1977 Act,[426] and raised the age limit of protection to eighteen.[427] Provisions raising the amount of potential fines were included,[428] along with new sections authorizing criminal and civil forfeiture actions against violators.[429] The definition of "sexually explicit" material was adjusted slightly: the first word in "lewd exhibition of the genitals or pubic area" was changed to "lascivious," and "sadistic or masochistic abuse" was substituted for "sado-masochistic abuse."[430] Written materials, finally, were clearly excluded from the law's reach in this area: only "visual depictions" of children are criminally actionable.[431]

The result of these revisions was a dramatic increase in federal prosecutions. In the first nine months after passage of the 1984 Act virtually the same number of people were indicted for federal child pornography offenses as had been indicted during the previous six years.[432] The production provisions, however,

continued to produce few indictments, in part because of the extraordinary difficulties of investigation and proof, and in part, perhaps, because the more easily used trafficking provisions often may be invoked against suspected producers instead. It appears, in any case, that the 1977 Act effectively halted the bulk of the commercial child pornography industry, while the 1984 revisions have enabled federal officials to move against the noncommercial, clandestine mutation of that industry.

State Laws. The federal interest in protecting children, of course, is secondary to that of the states, which act as principal guardians against the abuse or neglect of the young. It was indeed a *state* law substantially broader than the 1977 Act which prompted the landmark decision in *New York v. Ferber*.[433] States are not limited, as is the federal government, to regulation of child pornography in or affecting interstate commerce; they have the power to prohibit *all* production and trafficking in such materials.

To a substantial extent the states have exercised that power. Nearly all ban the production of child pornography, and an overwhelming majority prohibit distribution as well.[434] Most prohibit as well parental consent or accession to use of children in sexually explicit materials, and many outlaw facilitation of sexual exploitation through financing, developing, duplication, or promoting child pornography.[435] Some have prohibited as well the *possession* of child pornography, an extremely effective weapon against child molesters.[436]

Yet it is clear, too, that much remains to be accomplished on the state level. Not all states ban trafficking in child pornography, so that it remains possible in some parts of this country to distribute such materials intrastate without fear of criminal penalty. Further, only

about half of the states protect children from use in pornography until their eighteenth birthday; in other states the age limit is set at sixteen or seventeen.[437] (This Commission has determined, indeed, that such protections should, on a somewhat more limited basis, be extended to age twenty-one.)[438] Finally, few states appear to have taken action to provide substantial assistance to *victims* of child pornography—either through direct aid or through encouraging private civil remedies.[439] The primary role of states in caring for children would seem to argue for their assumption of the principal share of the burden of providing such assistance.

The legislative assault on child pornography drastically curtailed its public presence; it has not, however, ended the problem. Sexual exploitation of children has retreated to the shadows, but no evidence before the Commission suggests that children are any less at risk than before. The characteristics of both perpetrators and victims, combined with the extremely limited state of professional understanding, make it unlikely that child pornography is a passing phenomenon.

Those who sexually exploit children do so for a wide range of reasons, and come from an extremely broad array of backgrounds, and occupations,[440] but it seems helpful to group them into two categories: "situational" and "preferential" molesters.[441] The former are people who act out of some serious sexual or psychological, need, but choose children as victims only when they are readily and safely accessible. "Preferential" molesters, on the other hand, are those with a clear sexual preference for children ("pedophiles" in common usage) who can only satisfy the demands of that preference through child victims. "Preferential" abusers collect child pornography and/or erotica almost as a matter of course. It is unclear how large each of these respective categories is, but it does seem apparent that

"preferential" child molesters over the long term victimize far more children than do "situational" abusers.

The approaches adopted by various perpetrators also vary widely. The most recent research on "child sex rings" indicates that they range in structure from highly organized, "syndicated" operations involving several perpetrators and many children with production of child pornography for sale or barter, to "solo" operations in which children are abused and photographed by only one perpetrator for his pleasure.[442] Child pornography, while serving primarily the perpetrator's own needs, is also useful for lowering the inhibitions of other children being recruited by the perpetrator.[443] Wholly commercial operations appear to be extremely unusual, but are still not unknown.[444]

The normal absence of commercial motives, and the strong sexual and/or psychological needs which push both situational and preferential molesters toward sexual abuse of children in pornography, suggest that the *demand* for such material may be somewhat inflexible. While situational abusers may be steered away from children as victims, preferential abusers may not—and they are prone, moreover, to far more frequent abuse. However strong the criminal law, sexual exploitation of children seems likely to remain an irresistible temptation for some.

What is worse, the *supply* of potential victims seems inexhaustible as well. Children used in pornography seem to come from every class, religion, and family background; a majority are exploited by someone who knows them by virtue of his or her occupation,[445] or through a neighborhood, community or family relationship. Many are too young to know what has happened; others are powerless to refuse the demand of an authority figure; some seem to engage in the conduct "volun-

tarily," usually in order to obtain desperately needed adult affection.[446] Adolescents used in pornography are often runaways, homeless youth or juvenile prostitutes who may feel with some justice that they have little choice but to participate.[447] Thus it seems clear that a large class of children and teenagers *vulnerable* to use in pornography will continue to exist. Even redoubled efforts to teach children to protect themselves from such involvement will not wholly blunt the strong social, family, and economic forces creating that vulnerability.

The rise of the child pornography "problem" took medical, social services and legal communities as much by surprise as it did Congress and the general public. It is only fair to note, therefore, that what one witness dubbed "conceptual chaos" is a serious obstacle to progress against sexual exploitation of children in pornography;[448] at present only a tiny quantity of serious scholarship on the subject has found its way into print.[449] There are indications, moreover, that researchers and clinicians attempting to specialize in the field have faced serious resistance from their peers.[450]

No profession is more open to the charge of ignorance in this area than the law itself.[451] Court procedures are particularly intimidating for children asked to relate extremely intimate sexual details that they know will be reacted to with horror by family and friends.[452] A criminal proceeding, moreover, creates a double bind for the child: if he is believed, a former "friend" will go to jail; if he is not, he must endure additional guilt from thoughts that perhaps he did not tell enough.[453] The study of novel investigative and courtroom procedures to address these problems is only in its infancy: where the child pornography itself is not sufficient, without use of the victim as a witness, to establish the prosecutor's case, parents are

likely to face an excruciating dilemma. Lawyers and judges, like doctors and mental health professionals, remain largely ignorant of how to respond to child pornography victims.

That ignorance is deeply unfortunate because the pain suffered by children used in pornography is often devastating, and always significant. In the short term the effects of such involvement include depression, suicidal thoughts, feelings of shame, guilt, alienation from family and peers, and massive acute anxiety.[434] Victims in the longer term may successfully "integrate" the event, particularly with psychiatric help,[435] but many will likely suffer a repetition of the abuse cycle (this time as the abuser), chronic low self esteem, depression, anxiety regarding sexuality, role confusion, a fragmented sense of the self, and possible entry into delinquency or prostitution.[436] All, of course, will suffer the agony of knowing the record of their sexual abuse is in circulation, its effects on their future lives unknowable and beyond their control.[437] That may well be their most unhealable wound.

Because the trauma inflicted on children by sexual exploitation is so great, it has seemed to the Commission particularly important to examine every possible approach to improving the state of the law and services to victims. While limitations of time and resources placed significant constraints on that effort, it was nonetheless possible to discuss the problem of child pornography from a number of different perspectives, and to develop recommendations where the evidence called for them. The recommendations so conceived follow, along with explanations of the reasons for each.

TABLE 1

Situational Child Molester

	REGRESSED	MORALLY INDISCRIMINATE	SEXUALLY INDISCRIMINATE	INADEQUATE
BASIC CHARACTERISTIC	Poor Coping Skills	User of People	Sexual Experimentation	Social Misfit
MOTIVATION	Substitution	Why Not?	Boredom	Insecurity and Curiosity
VICTIM CRITERIA	Availability	Vulnerability and Opportunity	New and Different	Non-Threatening
METHOD OF OPERATION	Coercion	Lure, Force, or Manipulation	Involve in Existing Activity	Exploits Size Advantage
PORNOGRAPHY COLLECTION	Possible	Sadomasochistic; Detective Magazines	Highly Likely; Varied Nature	Likely

Source: U.S. Department of Justice, Federal Bureau of Investigation, *CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement*, 19, (1988).

TABLE 2

Preferential Child Molester

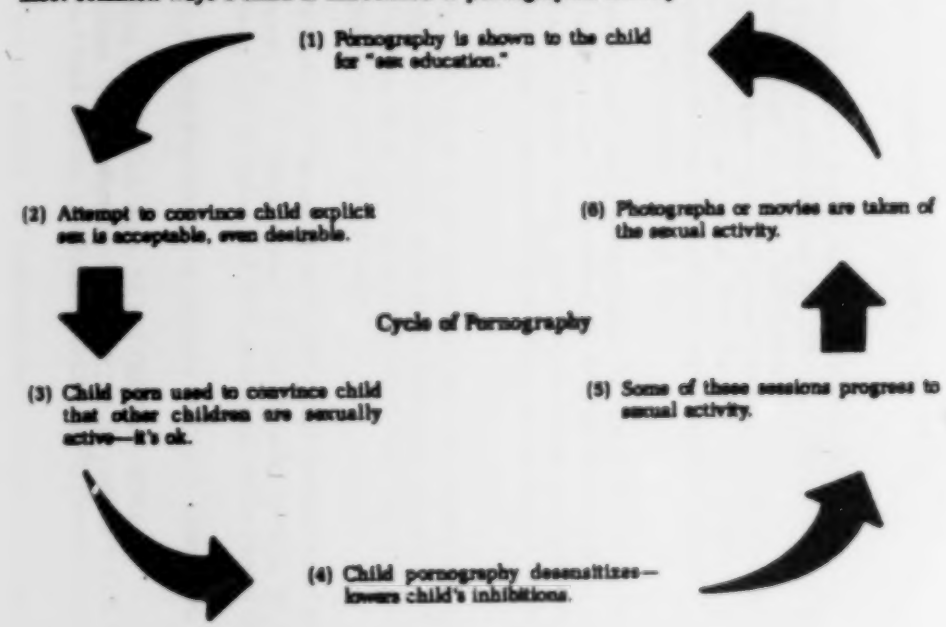
	SEDUCTION	INTROVERTED	SADISTIC
COMMON CHARACTERISTICS	1. Sexual Preference for Children 2. Collect Child Pornography and/or Erotica		
MOTIVATION	Identification	Fear of Communication	Need to Inflict Pain
VICTIM CRITERIA	Age and Gender Preferences	Strangers or Very Young	Age and Gender Preferences
METHOD OF OPERATION	Seduction Process	Non-Verbal Sexual Contact	Lure or Force

Source: U.S. Department of Justice, Federal Bureau of Investigation, *CHILD MOLESTERS: A Behavioral Analysis for Law Enforcement*, 25, (1986).

TABLE 3

Cycle

One of the most common questions asked from a public that knows very little about child pornography is: "How does child pornography begin?" This diagram explains one of the most common ways a child is introduced to pornographic activity:


(1) Pornography is shown to the child for "sex education."
(2) Attempt to convince child explicit sex is acceptable, even desirable.
(3) Child porn used to convince child that other children are sexually active—it's ok.
(4) Child pornography desensitizes—lowers child's inhibitions.
(5) Some of these sessions progress to sexual activity.
(6) Photographs or movies are taken of the sexual activity.
Cycle of Pornography

Source: S. O'Brien, Child Pornography, 80, (1983).

387. *Report of the Commission on Obscenity and Pornography* 7-23 (1970).

388. *Id.*, p. 139.

389. *Id.*, pp. 57-67.

390. See, Photographic vase drawings in K. J. Dover, *Greek Homosexuality* (1978).

391. See, description of P. Aries, *Centuries of Childhood*, pp. 100-102 (1962) (diary of Heroard, physician to Henri IV, who set down graphic details of sexual "play" with the child Louis XIII).

392. 458 U.S. 474, 746 (1982). The Court also required that the "category of 'sexual conduct' proscribed must also be suitable limited and described," *id.*, and must not include mere "nudity." *Id.*, p. 765 n. 18. The New York statutes in question, Penal Law 263.15, was found to fit these requirements even though it included "lewd exhibition of the genitals" in its definition of proscribed sexual conduct. *Id.*, p. 773.

393. The Ferber Court began its analysis of "child pornography" by noting the judgment of legislators and clinicians that "the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child," a judgment the Court found "easily passes muster under the First Amendment." *Id.*, p. 758. Ferber thus rests squarely on the assumption that the materials in question are limited to those in the production of which *actual* children have been used.

394. *Id.*, p. 764.

395. Thus the Court found that "a work which, taken as a whole, contains serious literary, artistic, political, or scientific value may nevertheless embody the hardest core of child pornography." *Compare, id*, pp. 774-775 (O'Connor, J., concurring) (no defense based on "serious value" should be allowed) *with id.*, pp. 775-777 (Brennan, J., concurring in the judgment) (such a defense required by First Amendment).

396. 413 U.S. 15 (1973).

397. For the full discussion of the problem of the use of adult performers in commercial pornography, See, Chapter 17.

398. S. O'Brien, *Child pornography*, p. 60 (1983) (arrests by Los Angeles police). In August of 1973 the sexually sadistic murder of twenty-seven young boys by Dean Corll was uncovered, while several other call-boy rings were also exposed that year.

399. See R. Lloyd, *For Money or Love: Boy Prostitution in America* (1977); C. Linedecker, *Children in Chains* 212-242 (1981).

400. *People v Fixler*, 128 Cal. Rptr. 363, 56 Cal. App. 3d 321 (2d Dist. 1976).

401. *Sexual Exploitation of Children, Hrgs. Before the Subcomm. on the Judiciary, U.S. House, 95th Cong., 1st Sess.* 63 (1977) (statement of Investigator Lloyd Martin, Los Angeles Police Dep't) (hearings hereinafter referred to as "Subcommittee on Crime Hearings").

402. For a reprint of the most influential articles See, Subcommittee on Crime Hearings, *supra* note 401, pp. 422-443.

403. Subcommittee on Crime Hearings, supra note 401; Sexual Exploitation of Children, Hrgs. Before the Subcomm on Select Education, Comm. on Education and Labor, U.S. House, 95th Cong., 1st Sess. (1977) (hereinafter "Select Education Subcommittee Hearings"); (Protection of Children Against Sexual Exploitation, Hrgs. Before the Subcomm. to Investigate Juvenile Delinquency, Comm. on the Judiciary, U.S. Senate, 95th Cong., 1st Sess. (1977) (hereinafter "1977 Senate Hearings").

404. S. Rep. No. 438, 95th Cong., 1st Sess. 5 (1977).

405. Subcommittee on Crime Hearings, supra note 402, p. 43 (testimony of Dr. Judianne Densen-Gerber, Presl, Odyssey Institute).

406. *Id.*, p. 59 (testimony of Lloyd Martin).

407. *Id.*, p. 117 (statement of Michael Sneed, reporter, Chicago Tribune).

408. Select Education Subcommittee Hearings, supra note 403, p. 116. (statement of Robin Lloyd).

409. *Id.*, pp. 42-43 (testimony of Lloyd Martin).

410. For an excellent overview of the production of child pornography in the Netherlands, Denmark and other northern European countries—as well as the repackaging for shipment to the United States of material originally produced in America—see, Child Pornography and Pedophilia, Hrgs. Before the Perm. Subcommittee on Investigations, Comm. on Governmental Affairs, U.S. Senate, 98th Cong., 2d Sess; Part 1 (1984) (especially testimony of Kenneth J. Herrmann, Jr., and Michael Jupp, and Toby Tyler, *id.*, pp. 322-37); and Child Pornography and Pedophilia, Hrg. Before the Perm. Comm. on Investigations, Comm. on Governmental Affairs, U.S. Senate, 99th Cong., 1st Sess., Part 2 (1985) (especially testimony of Elliott Abrams, *et al.*, members of federal interagency group which traveled to Denmark, The Netherlands, and Sweden to discuss problem of child pornography with government officials) (hearing hereinafter referred to as "1985 Hearings").

411. For a more complete discussion and comparison of the relevant federal statutes, see, Loken, The Federal Battle Against Child Sexual Exploitation; Proposals for Reform, Harv. Women's L. J. (1986).

412. P. L. 95-225, 92 Stat. 7 (1978), codified, p. 18 U.S.C.S. SS2251-2253 (1979).

413. 18 U.S.C.S. S2251(a) (1979).

414. 18 U.S.C.S. S2253 (1979).
415. 18 U.S.C.S. S2251(c) (1979).
416. 18 U.S.C.S. S2251(b) (1979).
417. 18 U.S.C.S. S2252 (1979).
418. *Id.*
419. *Id.*
420. P. L. 98-299, 98 Stat. 204 (1984), codified at 18 U.S.C.S SS2251-2255 (1985 Supp.). The constitutionality of this act has recently been sustained by two different federal court. *United States v. Tolczeki*, 614 F. Supp. 1424 (N.D. Ohio 1985).
421. 1985 Hearing, *supra* note 410, p. 104 (statement of Victoria Toensing, Dep'y Asst. Attorney General).
422. *Exploited and Missing Children, Hrg. Before the Subcomm. on Juvenile Justice, Comm. on the Judiciary, 97th Cong., 2nd Sess.* 47 (statement of Charles P. Nelson).
423. *Id.* at 39 (statement of Dana E. Caro).
424. *Child Pornography, Hrg. Before the Subcomm. on Juvenile Justice, Senate Comm. on the Judiciary, 97th Cong., 2nd Sess.* (1982) (statement of Robert Pitler, Bureau Chief, Appeals Bureau, District Attorney's Office for New York County).
425. 18 U.S.C.S. S2252(a) (1979).
426. *Id.*
427. 18 U.S.C.S. S2255 (1) (1979).
428. 18 U.S.C.S. SS2251, 2252 (1979).
429. 18 U.S.C.S. SS2253, 2254 (1979).
430. 18 U.S.C.S. S2255 (1979).

441. For these categories and the analysis that follow from them the Commission is grateful to Special Agent, Kenneth Lanning, F.B.I.

442. Belanger, *supra* note 441, p. 51.

443. Lanning, *Collectors*, in *Sex Rings*, *supra* note 440, p. 86.

444. See, *Sex Rings*, *supra* note 440, pp. 67-73, 78 (seventeen of fifty-four child sex rings studies were "syndicated", most of which sold child pornography and used children in prostitution).

445. *id.*, pp. 74-75 (38.2 percent of offenders studied had access to children through occupation; 27.3 percent through their "living situation").

446. U. Schoettle, *Report to the United States' Attorney General's Comm'n on Pornography* 11 (Miami Hearing).

447. See, Rabun, *Combatting Child Pornography and Prostitution: One County's Approach*, in *Child Sex Rings*, *supra* note 441, pp. 187-200 (fifteen percent of runaways acknowledged involvement in pornography. James Scanlon & Price *Youth Prostitution*, in *Child Sex Rings*, p. 139 (seventy-five percent of male hustlers aged fourteen to twenty-five had participated in pornography).

448. Miami Hearing, Vol. I, Roland Summit, p. 210A19.

449. The leading studies seem to be those contained in *Child Sex Rings*, *supra* note 440, and U. Schoettle, *Child Exploitation: A Study of Child Pornography*, 19 J. Am. Acad. Child Psych. 289 (1980) (cited by the Court in *New York v. Ferber*, 458 U.S. at 758 n. 9) [hereinafter "Child Exploitation"].

450. Statement of Roland Summit, *supra* note 448, pp. 8-15.

431. 18 U.S.C.S. SS2251, 2252 (1979).

432. 1985 Hearing, *supra* note 410, at 104 (Victoria Toensing). Statistics provided to the Commission by the Department of Justice indicate that 183 of the 255 indictments under federal child pornography laws from 1978 to February 27, 1986, were obtained *after* passage of the 1984 Act on May 21, 1984.

433. The law in question was N.Y. Penal Law S263.15.

434. National Legal Resources Center for Child Advocacy and Protection, A.B.A., *Child Sexual Exploitation: Background and Legal Analysis* 35 (1984) (49 states as of November 1984) (hereinafter "A.B.A. Analysis").

435. *Id.*, p. 36.

436. Thus Special Agent Kenneth Lanning of the F.B.I. noted in his testimony before the Commission that "pedophiliacs" almost always collect child pornography and/or child erotica." Miami Hearing, Vol. I., Kenneth Lanning, p. 232.

437. A.B.A. Anaylsis, *supra* note 434, p. 37.

438. See, The discussion in this Chapter for Recommendations for Federal Legislation, *infra*.

439. As an example of the difficulty of obtaining for children victimized in sexually explicit material see, *Faloona v. Hustler Magazine*, 607 R. Supp. 1341 (D.C. Tex. 1985), *appeal* docketed, No. 85-1359 (5th Cir. 1985).

440. Washington Hearing, Vol. I, Daniel Mihalko, p. 149; Belanger, *et. al.*, *Typology of Sex Rings Exploiting Children*, in *Child Pornography and Sex Rings* 74 (A. Burgess ed. 1984) (hereinafter "*Sex Rings*").

451. The most scathing indictment of the legal system's capacity to bring child pornography cases to justice was supplied to the Commission by Dr. Roland Summit, who said, in part: "Sex crimes, more than 'legitimate' crimes, seem to require criminal conviction to justify public validation. That standard in itself represents another Catch 22 in favor of traditional denial. The insistence of proof beyond reasonable doubt for an invisible and illogical crime almost guarantees suppression and repudiation." *Id.* pp. 5-6.

452. See *generally*, Summit & Kryso, *Sexual Abuse of Children: A Clinical Perspective*, in *Children and Sex*, pp. 111, 123-124 (L. Constantine & F. Martinson eds. 1981).

453. *Child Exploitation*, *supra* note 449, p. 297.

454. Schoettle Statement, *supra* note 446, p. 10.

455. Burgess, *et al.*, *Impact of Child Pornography and Sex Rings on Child Victims and Their Families* in *Child Sex Rings*, *supra* note 440, pp. 115-117.

456. Schoettle Statement, *supra* note 446, p. 10.

457. See *New York v. Ferber*, *supra* note 392, 458 U.S., p. 759, and studies cited therein.

APPENDIX C

RECOMMENDATIONS FOR STATE LEGISLATION

RECOMMENDATION 45:
State legislatures should amend laws, where necessary, to make the knowing possession of child pornography, a felony.

Discussion

The United States Supreme Court has called child pornography "a serious national problem."[524] In *New York v.Ferber*, the Court said that child pornography constitutes a permanent record of the children's participation in sexual activity, and the circulation of the pornography exacerbates the harm to the children. If the sexual abuse of children in pornography is to be curtailed the production and distribution network must be eliminated.[525]

Investigators have identified several uses of child pornography. The first use by pedophiles is for sexual arousal and gratification.[526] While some pedophiles only collect child pornography and fantasize through it, many have used it as a device to aid in the production of their own child pornography.

Child pornography is often used as part of a method of seducing child victims.[527] A child who is reluctant to engage in sexual activity with an adult or to pose for sexually explicit photos can sometimes be convinced by view-

ing other children having "fun" participating in the activity.[328] From a very early age children are taught to respect and believe material contained in books and will thus have the same beliefs about child pornography.[329]

A pedophile offender will use child pornography in which the children appear to be having a good time.[330] The offender uses this material to lower the inhibitions of the child and entice him or her into a desired activity. Children who view this material are also subject to a certain amount of peer pressure as they see other children engaged in the activity.

Child pornography is also used to illustrate the activities in which the pedophile wishes a child to engage.[331] In such instances a pedophile offender shows the child the pornography and asks the child to imitate the pictures.

Pornographic depictions of a child may be used to blackmail the child.[332] The pedophile offender will use the pictures to intimidate the child. The pedophile offender will threaten the child with showing the pictures to others if the child does not cooperate.

Child pornography is also seen as a valuable commodity among pedophiles. Visual depictions may be traded or sold between collectors.[333] This subjects a child to repeated victimization by countless numbers of pedophiles and makes the child the object of the pedophile's sexual fantasies.[334] Child pornography which may have originated as a homemade item may eventually by sold to a commercial child pornography publication.[335]

Child pornography has a life of its own. It is a permanent record of the victimization and sexual abuse of the child.[336] The depictions are timeless and may be distributed and circulated throughout the world for years after they are initially created. Each time the pornography is exchanged the children involved are victimized again.[337]

The harms to children from child pornography which the Supreme Court outlined in *New York v. Ferber* occur as a result of the existence of the material itself.[338] The enactment of criminal penalties for the possession of child pornography is essential if these harms are to be effectively curtailed.

Several states have recently recognized the inherent harm in child pornography and have enacted legislation prohibiting the possession of such material.[339] Only recently has this type of legislation met any constitutional challenge.[340] This challenge has been premised on the Supreme Court's ruling in *Stanley v. Georgia*.[341]

In *Stanley*, police executed a search warrant on the defendant's residence seeking evidence of a suspected bookmaking operation.[342] They located three reels of eight millimeter film in a desk drawer and upon viewing the films, they charged the defendant with possession of obscene matter.[343] He was convicted before a jury.[344] The Supreme Court reversed the conviction and held that "the mere private possession of obscene matter cannot constitutionally be made a crime."[345]

The first constitutional challenge to a state statute prohibiting the possession of child pornography came on December 1, 1985. The first appellate district in Ohio found the state law prohibiting possession of child pornography[346] to be unconstitutional.[347] The analysis used in invalidating the statute was based upon the rationale of *Stanley v. Georgia*.[348] The Ohio statute was declared unconstitutional because the state could not punish the mere private possession of magazines "which depicted minors . . . engaging in sexual activ-

ity."[549] *New York v. Ferber*[550] was distinguished on the grounds that it dealt with distribution and not mere possession of child pornography.[551] In finding the statute unconstitutional the Ohio court placed great significance on the language in *Stanley* where the Supreme Court rejected the contention by the state of Georgia that to eliminate the traffic in obscenity, it is necessary to bar mere private possession by an individual.[552]

In *United States v. Miller*,[553] the United States Court of Appeals for the Eleventh Circuit recently upheld the conviction of a defendant who received child pornography from Europe through the mail.[554] The defendant contended that 18 U.S.C. S2252 (a)(a) violated [555] his right to privacy and relied on *Stanley* for his claim that the statute was unconstitutional.[556] The court rejected the defendant's argument that the statute only applies to individuals who intend to distribute child pornography.[557] However, in considering the privacy issue, the court said "prior decisions on the issue of the right to possess obscene materials are controlling in our analysis of this case."[558]

The court relied on several obscenity decisions in which the Supreme Court rejected the argument that *Stanley* created a right to import or receive obscene materials for private use.[559] The court concluded that *Stanley* cannot be expanded to create a right to receive child pornography through the mail.[560]

Any reliance on the rationale of *Stanley* or other obscenity cases with respect to a prohibition against the possession of child pornography is misplaced. *Stanley* upheld an individual's right to privately possess ob-

scene material.[561] The prevailing obscenity standard at the time of the *Stanley* decision was contained in *Roth v. United States*.[562] *Roth* has since been modified in most jurisdictions by *Miller v. California*.[563]

In *New York v. Ferber*,[564] the Supreme Court upheld a New York law prohibiting the promotion of sexually explicit depictions of children that were not obscene under *Miller*.[565] In *Ferber*, the Court reasoned that the *Miller* standard, like all general definitions of what may be banned as obscene, does not reflect the state's particular and more compelling interest in prosecuting those who promote the sexual exploitation of children. The question under the *Miller* test of whether a work, taken as a whole, appeals to the prurient interest of the average person bears no connection to the issue of whether a child has been physically or psychologically harmed in the production of the work. Similarly, a sexually explicit depiction need not be "patently offensive" in order to have sexually exploited a child through its production. In addition, a work which, taken as a whole, contains serious literary, artistic, political or scientific value may nevertheless embody the most grevious form of child pornography. The Supreme Court reasoned in *Ferber*, "It is irrelevant to the child [who has been abused] whether or not the material . . . has a literary, artistic, political or social value. Memorandum of Assemblyman Lasher in Support of S263.15. We therefore cannot conclude that the *Miller* standard is a satisfactory solution to the child pornography problem."[566]

Any analysis concerning the constitutionality of laws prohibiting the possession of

child pornography should not be made as a parallel to obscenity statutes. The Supreme Court has clearly distinguished the standards to be applied to child pornography laws and adult obscenity statutes.[567]

The Supreme Court stated in *Ferber* that "the nature of the harm to be combatted requires that the state offense be limited to works that visually depict sexual conduct by children below a specified age."[568] The Court went on to clarify its statement by noting that "the distribution of descriptions or other depictions of sexual conduct, not otherwise obscene, which do not involve live performance or photographic or other visual reproduction of live performances, retains First Amendment protection."[569]

The obscenity precedent is clearly inapplicable to a challenge against a statute in which the offense described clearly involved visual depictions of children engaged in sexual activities.[570]

The rationale underlying the Supreme Court's ruling in *Stanley* is vastly different from that in *Ferber*. In *Stanley*, the Court upheld the defendant's right to "read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home . . . free from state inquiry into the contents of his library."[571] The Court also found, at that time, "little empirical basis" for the assertion made by the state of Georgia that "exposure to obscene materials may lead to deviant sexual behavior or crimes of sexual violence."[572] However, the Court added in a footnote:

> What we have said in no way infringes upon the power of the State or Federal Government to make possession of other items, such as narcotics, firearms, or stolen goods, a crime. Our holding in the present case turns upon the Georgia statute's infringement of fundamental liberties protected by the First and Fourteenth Amendments. No First Amendment rights are

involved in most statutes making mere possession criminal.

> *Nor do we mean to express any opinion on statutes making criminal possession of other types of printed, filmed, or recorded materials.* See, e.g., 18 U.S.C. S793 (d), which makes criminal the otherwise lawful possession of materials which "the possessor has reason to believe could be used to the injury of the United States or to the advantage of any foreign nation . . ." In such cases, *compelling reasons may exist for overriding the right of the individual to possess those materials.*[573]

While Ferber admittedly dealt with a statute prohibiting the distribution of child pornography, the decision recognized compelling reasons for overriding the right of an individual to possess child pornography.[574] The Court found that "it is evidence beyond the need for elaboration that a state's interest in safeguarding the physical and psychological well-being of a minor is 'compelling.'"[575] While the Court in *Stanley* found little evidence then existing that exposure to obscene materials may lead to deviant sexual behavior or crimes of violence,[576] the Court clearly states in Ferber that "the legislative judgment, as well as the judgment found in the relevant literature, is that the use of children as subjects of pornographic materials is harmful to the physiological, emotional, and mental health of the child."[577] Child pornography constitutes a permanent record of the sexual abuse of the child and the harm to the child is exacerbated by the circulation of the material.[578] The very existence of child pornography harms the children who are depicted. According to one child psychiatrist quoted in Ferber, "the victim's knowledge of publication of the visual material increases the emotional and psychic harm suffered by the child."[579] With respect to obscene materials in *Stanley*, the Court found the privacy rights of the individual to be the overriding

concern. In Ferber, however, the Court clearly found the harm suffered by minors to be of paramount importance. The focus of the protection constitutes a major distinction between these two landmark decisions. The Ferber Court's concern for minors included the consideration that when child pornography is produced and distributed, the *child's* privacy interests are violated.[580]

The Court in *Stanley* rejected the argument that prohibition of the possession of obscene materials is a necessary incident to statutory schemes prohibiting distribution.[581] In *Ferber*, the Court recognized that it may be difficult, if not impossible, to stop the sexual exploitation of children by pursuing only those who produce child pornography.[582] Citing the clandestine nature of the child pornography trade, the Court noted that "the only practical method of law enforcement may be to dry up the market for this material . . ."[583] The prohibition of the mere possession of child pornography is a necessary incident to "drying up the market" for a product the Supreme Court has found to be extremely harmful to the youth of the nation. Such laws are also entirely consistent with the objectives sought to be attained by the Court in *Ferber* and should not be confused with other considerations relevant in the obscenity law context.

524. *New York v. Ferber*, 458. U.S., (1982), pp. 747, 749.
525. *Id.*, pp. 759–60.
526. K. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, (A. Wolbert Burgess ed. 1984), p. 86.
527. *Id.*
528. U.S. Department of Justice, Federal Bureau of Investigation, *Child Molesting: A Behavioral Analysis for Law Enforcement*, (1986), p. 61.
529. *Id.*
530. *Id.*
531. Child pornography magazines frequently include pictures of children viewing child pornography and replicating the poses or scenes depicted therein. Miami Hearing, Vol. I, R.P. "Toby" Tyler, p. 178A4.
532. Miami Hearing, Vol. II, Paul Der Ohannesian II, p. 51; *See also*, K. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, (A. Wolbert Burgess ed. 1984), p. 86.
533. K. Lanning, *Collectors*, in *Child Pornography and Sex Rings*, A. Wolbert Burgess ed. 1984), p. 86.
534. *Id.*
535. *Id.*

536. Miami Hearing, Vol. I, William Dworin, p. 30.
537. Washington, D.C., Vol. II, John, pp. 47–48.
538. 458 U.S., (1982), p. 747.
539. See, e.g., "Sexual exploitation of a minor; classification A. A person commits sexual exploitation of a minor by knowingly:

1. Recording, filming, photographing, developing or duplicating any visual or print medium in which minors are engaged in sexual conduct.

2. Distributing, transporting, exhibiting, receiving, selling, purchasing, possessing or exchanging any visual or print medium in which minors are engaged in sexual conduct.

B. Sexual exploitation of a minor is a class 2 felony." Ariz. Rev. Stat. Ann. S13-3553(1984);

"A person who has in possession a photographic representation of sexual conduct which involves a minor, knowing or with reasons to know its content and character and that an actor or photographic subject in it, is guilty of a gross misdemeanor." Minn. Stat. S617.247(1984);

"A person who knowingly and willfully has in his possession any film, photograph or other visual presentation depicting minors engaging in or simulating, or assisting others to engage in or simulate sexual conduct is guilty of a misdemeanor." Nev. Rev. Stat. S200.730(1984);

"A. No person, with knowledge of the character of the material or performance involved, shall do any of the following:

5. Possess or control any obscene material, that has a minor as one of its participants. With purpose to violate division (A)(2) or (4) of this section." Ohio Rev. Code Ann. S2907.321(1984).

540. *Ohio v. Meadows*, No. 84 CRB 25585, Slip op. (1st Dist. Dec. 18, 1985) *cert. granted* (Ohio Apr. 9, 1986) (No. 86-233).
541. 394 U.S., (1969), p. 557.
542. *Id.* p. 558.
543. *Id.*
544. *Id.* pp. 558-59.
545. *Id.* p. 559.
546. R.C. 2907.321(a)(5) (1985).
547. *Ohio v. Meadows*, No. 84 CRB 25585, Slip op. (1st Dist. Dec. 18, 1985), *cert. granted*, (Ohio Apr. 9, 1986) (No. 86-233).
548. 395 U.S., (1969), p. 557.

549. *Ohio v. Meadows*, No. 84 CRB 25585, Slip. op. (1st Dist. Dec. 18, 1985); *cert. granted*, (Ohio Apr. 9, 1986) No. 86-233).
550. 458 U.S. 747(1982).
551. *Ohio v. Meadows*, No. 84 CRB 25585, Slip. op. at 9 (1st Dist., Dec. 18, 1985); *cert. granted* (Ohio Apr. 9, 1986) (No. 86-233).
552. *Id.* at 7.
553. 776 F.2d 978 (11th Cir 1985), *cert. denied*. 54 U.S. L.W. 3698 (U.S. Apr. 22, 1986) (No. 85-1177).
554. *Id.*
555. This provision of the Child Protection Act provides penalties for any person who "knowingly receives or distributes any visual depiction . . ."

556. 778 F.2d, p. 980.
557. *Id.*, p. 979.
558. *Id.*, p. 980 n. 4.
559. *Id.* The court of appeals relied on *United States v. Reidel*, 402 U.S. 35191971); *United v. 12 200 Ft. Reels*, 413 U.S. 123(1973); *United States v. 37 Photographs*, 402 U.S. 363(1971); *United States v. Orito*, 413 U.S. 139(1973).
560. *Id.*, p. 981.
561. 394 U.S. p. 559.
562. 354 U.S., (1957), p. 476.
563. 413 U.S., (1973), p. 15.
564. 458 U.S., (1982), p. 747.
565. *Id.*, pp. 760–61.
566. *Id.*, p. 761.
567. 458 U.S., (1982), p. 747.
568. *Id.*, p. 764.
569. *Id.*, pp. 764–65.
570. *Ohio v. Meadows*, supra note 540, p. 24; 18 U.S.C. S2252(a)(2).
571. 394 U.S., p. 565.
572. *Id.*, p. 566. This Commission has found evidence of harm from exposure to pornography based upon evidence produced since the *Stanley* decision. See, Textual discussion of harms in Chapter 5.
573. *Id.*, p. 568, n. 11.
574. *Id.*, p. 568.
575. *Id.*, p. 756–57.
576. 394 U.S., p. 566.
577. 458 U.S., p. 758.
578. *Id.*, p. 759.
579. *Id.*, p. 759, n. 10.
580. *Id.*, p. 758, n. 9.
581. 394 U.S., p. 567.
582. 458 U.S., p. 760.
583. *Id.*